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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

FOUR SIDED PROPERTIES, LLC, Plaintiff and Respondent, v. CITY OF LOS ANGELES et al., Defendants and Respondents BRENTWOOD RESIDENTS COALITION et al., Movants and Appellants.	B229036 (Los Angeles County Super. Ct. No. BS123704)

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert O'Brien and Mel Red Recana, Judges. Affirmed.

Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg, Thomas R. Freeman for Movants and Appellants.

Jeffer Mangels Butler & Mitchell, Benjamin M. Reznik, Matthew D. Hinks for Plaintiff and Respondent.

Carmen A. Trutanich, City Attorney, Terry Kaufmann-Macias, Supervising City Attorney, Amy Brothers, Deputy City Attorney, for Defendants and Respondents.

Two organizations representing Brentwood homeowners oppose the development of a large restaurant/retail project that will have only five parking spaces. When the planning commission voted unanimously against the proposal in 2009, the project developer filed a petition for a writ of mandate. Over opposition presented by the City of Los Angeles, the developer prevailed. After the petition was granted, the homeowners organizations asked to intervene in the litigation, claiming that the city attorney failed to defend the planning commission's decision. We affirm the trial court's denial of the application to intervene: the request was not timely.

FACTS

Four Sided Properties, LLC (4-Sided) owns property on San Vicente Boulevard in Brentwood. For many years, the property housed a health club, a furniture store, and a hair salon. A 1971 occupancy permit required five parking spaces for these uses.

In September 2008, 4-Sided applied to the City of Los Angeles (the City) for a permit to turn its property into restaurant and retail space. The City's Department of Building and Safety issued a building permit in October 2008, allowing the proposed changes. The permit did not require any additional parking spaces for the new use. The City "grandfathered" the right to provide only five parking spaces.

The Brentwood Homeowners Association (BHA) appealed the issuance of the building permit, complaining that the City should require additional parking spaces for 4-Sided's proposed new use. The City's zoning administrator denied BHA's appeal in June 2009. BHA appealed again, successfully, before the West Los Angeles Planning Commission in September 2009. The planning commission found that no permit could issue unless 4-Sided obtained additional parking.

In November 2009, 4-Sided filed a petition for writ of mandate and complaint for damages, in response to the ruling of the planning commission. The city attorney answered the petition. In an August 2010 brief, the City argued: (1) the writ petition is moot because 4-Sided recently received a building permit after agreeing to provide 57 parking spots (five on site and 52 off site), and (2) the decision of the planning commission is supported by substantial evidence. The City cited testimony from BHA

members that inadequate parking at 4-Sided's project would worsen traffic in Brentwood. 4-Sided objected to the City's evidence about the newly issued permit, because it was not in the record before the planning commission and 4-Sided protested the parking requirement, terming it "onerous." Following a hearing, the trial court granted the writ petition on August 27, 2010, finding that the planning commission determination is not supported by the evidence.

A week *after* the writ petition was granted, the Brentwood Residents Coalition (BRC) filed an ex parte motion to intervene. BRC argued that the city attorney failed to properly represent the interests of local residents in the writ proceeding, resulting in a miscarriage of justice. In a declaration, the president of the BRC conceded awareness of the writ petition filed by 4-Sided, but believed that the city attorney would do a better job of defending the planning commission. Although BRC's attorneys read the City's brief and knew of the hearing on the writ, they did not request a continuance of the hearing in order to intervene.

The trial court (Hon. Robert O'Brien) denied BRC's ex parte motion to intervene at a hearing on September 2, 2010. The court indicated that the motion to intervene was filed "a little too late here," adding that "[t]he case has already been decided." By the same token, Judge O'Brien suggested that BRC try to intervene in the department where the case was being transferred. Following Judge O'Brien's advice, BRC and BHA filed a proposed complaint in intervention and "suggested" reconsideration of Judge O'Brien's ruling. 4-Sided opposed the motion, arguing that: the court cannot alter Judge O'Brien's ruling; the motion was untimely; and appellants lack a direct and immediate interest in the litigation.

At the hearing on the second motion to intervene, the court (Hon. Mel Red Recana) questioned whether appellants could "sort of sit on the sideline and look at what's happening . . . [n]ow that the result is contra their wishes, now they want to intervene? Why did they not intervene at the first instance?" 4-Sided objected that Judge O'Brien made a final ruling on the writ that appellants challenged, and Judge Recana only had the damages portion of the dispute before him. Judge Recana noted that

Judge O'Brien was slated to issue the writ the following day, so the motion should be decided by Judge O'Brien. Judge Recana denied the second motion to intervene on November 22, 2011. BRC and BHA appeal from the denial of the second motion to intervene.

DISCUSSION

1. Appeal and Review

An order denying the right to intervene in pending litigation is appealable because it ends the would-be intervenor's participation in the litigation. (*Dollenmayer v. Pryor* (1906) 150 Cal. 1, 3; *Ryerson v. Riverside Cement Co.* (1968) 266 Cal.App.2d 789, 793; *Thorpe v. North Moneta Garden Lands Water Co.* (1909) 12 Cal.App. 186, 187; *Bame v. City of Del Mar* (2001) 86 Cal.App.4th 1346, 1362-1363.) While the statute permitting third party intervention in a lawsuit is liberally construed, the trial court exercises broad discretion. (*City of Malibu v. California Coastal Com.* (2005) 128 Cal.App.4th 897, 902; *Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 109.) The court's ruling cannot be disturbed unless there was a miscarriage of justice. (*City and County of San Francisco v. State of California* (2005) 128 Cal.App.4th 1030, 1036.)

2. Timeliness of the Appeal

4-Sided contends that the appeal is untimely and must be dismissed. BRC's ex parte motion to intervene in the litigation was denied on September 2, 2010. The collective attempt of BRC and BHA to intervene was denied on November 22, 2010. This appeal was taken on November 23, 2010, 82 days after the ex parte motion was denied, and one day after the second motion to intervene was denied.

If neither the court clerk nor a party serves a document entitled "Notice of Entry," an appeal must be filed within 180 days after judgment. (Cal. Rules of Court, rule 8.104(a); *Citizens for Civic Accountability v. Town of Danville* (2008) 167 Cal.App.4th 1158, 1164; *Carmel, Ltd. v. Tavoussi* (2009) 175 Cal.App.4th 393, 398-399.) 4-Sided does not point to a "Notice of Entry" in the record for the September 2 ruling. The reporter's transcript does not show that the parties agreed to waive notice. As a result, the appeal was timely filed 82 days after BRC's motion to intervene was denied.

Judge O'Brien invited BRC to renew its motion to intervene before Judge Recana. Thus, the September 2 denial of BRC's ex parte motion does not appear to be a final determination that "contemplated no further action" by the court. (*Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 583.) The court contemplated a second attempt to intervene. Judge Recana's denial of the combined BHA/BRC motion on November 22 was the final determination, and this appeal was taken one day later.

3. Mootness

4-Sided argues that the appeal is moot, because the litigation continued to judgment after appellants' motions to intervene were denied and the judgment cannot be disturbed. If the trial court errs in denying a motion to intervene, the later entry of judgment "cannot make that error moot." (*Linder v. Vogue Investments, Inc.* (1966) 239 Cal.App.2d 338, 343; *In re Veterans' Industries, Inc.* (1970) 8 Cal.App.3d 902, 916.)

4. Denial of Appellants' Motion to Intervene

The right to intervene is purely statutory, and by no means absolute. (*Muller v. Robinson* (1959) 174 Cal.App.2d 511, 515.) The statute authorizes both permissive and mandatory intervention by nonparties. Appellants do not claim that intervention is mandatory. Under the permissive subdivision, a person "who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both" may seek "[u]pon timely application" to intervene in the action. (Code Civ. Proc., § 387, subd. (a).) The court may permit intervention if the intervenor has a direct and immediate interest in the litigation; the intervention will not enlarge the issues in the case; and the reasons for intervention outweigh any opposition by the existing parties. (*City of Malibu v. California Coastal Com., supra,* 128 Cal.App.4th at p. 902; *Truck Ins. Exchange v. Superior Court* (1997) 60 Cal.App.4th 342, 346.)

Intervention is allowed "upon timely application."[1] Appellants argue that they did not need to intervene until they discovered that the city attorney failed to diligently

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[1] Prior to a 1977 amendment, intervention was allowed "[a]t any time before trial." (Former Code Civ. Proc., § 387.)

defend the decision of the planning commission during the writ proceeding brought by 4-Sided. In appellants' view, the shortcomings in the city attorney's opposition to the writ petition are demonstrated by the absence of (1) any substantive argument in support of the planning commission and (2) any discussion of environmental issues identified by the planning commission. 4-Sided sought to intervene "within days of discovering the City's Attorney's effective default." The trial judges denied appellants' motions because they waited too long to intervene, or "sat on the sidelines" until the writ petition was decided in favor of 4-Sided.

"[I]t is the general rule that a right to intervene should be asserted within a reasonable time and that the intervener must not be guilty of an unreasonable delay after knowledge of the suit." (*Allen v. California Water & Tel. Co.* (1947) 31 Cal.2d 104, 108.) "It is also the general rule that an intervention will not be allowed when it would retard the principal suit, or require a reopening of the case for further evidence, or delay the trial of the action, or change the position of the original parties." (*Sanders v. Pacific Gas & Elec. Co.* (1975) 53 Cal.App.3d 661, 669.) A record may show unreasonable delay if the intervenor does not take timely action despite being "informed of the pendency of the litigation, the issues involved, and of the progress of the suit." (*Allen v. California Water & Tel. Co.*, *supra*, 31 Cal.2d at p. 108.) After the trial has concluded and a judgment is entered, the trial court cannot permit belated intervention by adjacent landowners in a zoning dispute between a landowner and the government. (*Leonard Corp. v. City of San Diego* (1962) 210 Cal.App.2d 547, 551-552.)

Here, appellants knew about the pendency of the litigation, the issues involved, and the progress of the suit. After the City's building department issued a permit to 4-Sided in 2008, BHA challenged the permit multiple times on appeal. It succeeded in 2009, when the planning commission found that 4-Sided was required to obtain enough parking spaces to meet current code standards, prompting 4-Sided to bring its petition for a writ of mandate. BRC joined the challenge after 4-Sided temporarily acquiesced to providing 57 parking spots in March 2010. Indeed, BRC participated in a challenge to 4-Sided's new building permit one day before the writ hearing. Though aware of the

impending hearing, appellants did not demand a continuance in order to be included in the proceeding.

Despite their involvement in the dispute over 4-Sided's planned development, appellants did not try to intervene in the writ proceeding from the time it was filed in November 2009 until it was decided in August 2010, even after the city attorney filed what appellants now characterize as a deficient opposition to the writ petition that failed to properly represent the interests of Brentwood residents. Instead, they sat by and awaited the trial court's ruling on the petition. Only *after* the court granted the petition did appellants seek to intervene and restart the writ process. Appellants have not demonstrated that the city attorney acted in bad faith (compare *Kobernick v. Shaw* (1977) 70 Cal.App.3d 914, 918) or consented to a violation of state law (see *Hansen Brothers Enterprises, Inc. v. Board of Superisors* (1996) 12 Cal.4th 533, 564).

In effect, appellants seek a second bite at the apple in response to the trial court's adverse ruling. This goes against the rule that belated intervention will not be allowed when it requires that a case to be reopened for further evidence. (*Sanders v. Pacific Gas & Elec. Co.*, *supra*, 53 Cal.App.3d at p. 669.) It is fundamentally unfair for intervenors to knowingly sit on the sidelines, then file a complaint in intervention in response to an adverse ruling in hopes of getting a retrial and a different result. In this case, there have been two trial court proceedings—the writ proceeding and the damages proceeding.[2] Reopening the litigation would occasion substantial expenditure for both the City and the developer. Appellants did not act in a timely manner to intervene in the litigation.

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[2] The City prevailed in the damages portion of the litigation.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.